Supreme Court, U. S.
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CASE NO. 80-187

THE SUPREME COURT
OF THE UNITED STATES

October Term 1980

Joseph C. Rush, M.D., Petitioner

vs.

Bayfront Medical Center, Inc., Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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STATEMENT OF THE CASE

In November of 1978, Petitioner, a radiologist, sued Respondent, a private hospital organized and existing under the laws of the State of Florida as a non-profit corporation, in federal court for damages and an injunction resulting from an alleged violation of his right to due process under the Fourteenth Amendment (R. 1-5). The factual basis of Petitioner's claim (as opposed to his jurisdictional allegations) is found in paragraphs 1 through 14 of his compliant (R. 1-3). The District Court's order granting Respondent's Motion to Dismiss, succinctly summarized much of Petitioner's complaint:

> Plaintiff, Joseph Rush, M.D., is a certified radiologist who has practiced at the Bayfront Medical Center in St. Petersburg, Florida, since 1968. He has enjoyed and apparently still enjoys staff privileges at the Medical Center. His complaint centers around an alleged "exclusive" 1978 agreement that the hospital entered into with Dr. Ralph

> Johnson, also a radiologist. This agreement established a program whereby outpatient radiation therapy treatments were offered for the first time at the hospital. Dr. Rush asserts that because of this agreement, his own radiation practice was effectively curtailed or "reduced" without compliance with an administrative hearing that is required under the hospital's by-laws. (R. 95).

Other pertinent facts set forth in paragraphs 1 through 14 of Petitioner's complaint are that the Respondent has been in existence since July of 1968, at which time it entered into a lease with the City of St. Petersburg, whereby the City-owned property and buildings formerly operated by the City as Mound Park Hospital were leased to Respondent for a term of thirty years.

Petitioner alleged jurisdiction under 42 U.S.C. §1983 and 28 U.S.C. §1343. As set forth in paragraph 15 of the complaint (R. 3-5), the facts relied on to establish jurisdiction are as follows:

1. The City leased to Respondent the property and premises it formerly operated as Mound Park Hospital for ten dollars a year.

2. Pursuant to the lease, Respondent agreed to continue administering funds for capital improvements previously approved by the City.

3. Although Respondent has responsibility under the lease for making repairs, the City has aided Respondent in making capital improvements and Respondent continued to request such aid.

4. The City can employ a consultant to inspect the leased premises and make recommendations concerning Respondent's budget with respect to maintenance and repair. Respondent must give due consideration to these recommendations. [emphasis supplied]

5. Respondent can recommend priorities for the expenditure of the capital

improvement fund and the City must consider these recommendations and not unreasonably reject them. [emphasis supplied]

6. Respondent may not assign or sublet the leased premises without the prior consent of the City.

7. The title to Respondent's assets will vest in the City upon termination of the lease.

Petitioner further alleged that the violation of his constitutional right to due process directly benefits the City because Respondent will receive greater profits as a result of its contract with Dr. Johnson and these profits will be returned to the City as part of Respondent's assets (R. 3-5).

A fact not alleged by Petitioner in his complaint is that the lease requires Respondent to be responsible for the management of the hospital (R. 11).

The parties conducted pre-trial discovery prior to the rendition of the order dismissing the case against Respondent for lack of subject matter jurisdiction under Section 1983. Of significance for purposes of jurisdiction under Section 1983 are Respondent's answers to Petitioner's interrogatories (R. 66-71). The following jurisdictional facts were established by Respondent's answers:

1. The only improvements which have been made by the City to the leased premises were those started by the City prior to the effective date of the lease. The City completed those (R. 66).

2. The City has not made any repairs to the leased premises since the inception of the lease (R. 66).

3. Respondent submitted a ten year plan to the City for its consideration in its 1979/80 Budget for the construction of certain improvements and repairs to

the premises (R. 67).

4. Respondent borrowed $2,000,000 from the City for the construction of certain improvements. Repayment is required. (R. 67).

5. The City allocated $1,200,000 of Federal Revenue Sharing Funds to Respondent in 1973. In 1977 the City supported Respondent's application for U.S. Economic Development Administration Grant Funds and Respondent was awarded about $1,300,000 (R. 68).

6. The City has not made any recommendations to Respondent concerning changes in Respondent's budget with respect to additional maintenance and repair for the leased premises (R. 67).

7. Respondent has not made any recommendations to the City concerning the expenditure of the Capital Improvement Fund referred to in paragraph 15(B) of Petitioner's complaint (R. 69).

8. No Capital Improvement Fund pursuant to paragraph 19 of the lease exists because the capital equipment, additions and improvements made by Respondent have exceeded Respondent's income accumulated over its eleven years of operation (R. 69).

9. The regulations specifying the qualifications required of all radiologists, referred to in Petitioner's complaint, were developed jointly by Robert Hoffman, M.D. and Ralph E. Johnson, M.D. These regulations were approved by Respondent's Standards and Credentials Committee, Medical Council, and Board of Trustees. Qualifications for staff privileges in the Respondent's Oncology Center are also contained in the Operational Policies for the Section of Radiation Oncology. These policies were approved by Respondent's Medical Council and its Board of Trustees (R. 70-71).

The District Court entered an order on November 15, 1979, dismissing the complaint with prejudice. Petitioner appealed to the United Stated Court of Appeals for the Fifth Circuit. On May 9, 1980, the Fifth Circuit affirmed the District Court's judgment per curiam without opinion. Petitioner filed his Petition for Writ of Certiorari in this Court on July 31, 1980. Respondent hereby files this brief in opposition thereto.

SUMMARY OF ARGUMENT

Petitioner has not shown sufficient grounds for granting conflict certiorari.

The decisions of this Court do not preclude considering allegations of racial discrimination in deciding threshold questions of state action. Nor does the fact that the Fifth Circuit in Greco v. Orange Memorial Hospital Corporation, 513 F.2d 873 (5th Cir. 1975), cert. denied, 423 U.S. 1000 (1975), recognized racial discrimination as a factor to be considered in deciding state action issues support Petitioner's contention that the Fifth Circuit applies a substantially more stringent test in matters of state action when racial discrimination is not involved than do other federal courts of appeals. On the contrary, if anything, other federal courts of appeals, including the First Circuit in Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978),

cert. denied, 439 U.S. 910 (1978), so heavily relied upon by Petitioner, have indicated a willingness to consider or do in fact consider allegations of racial discrimination as a factor to be considered in deciding state action issues.

Petitioner's argument with respect to a conflict on the issue of the requirement of a governmental "nexus" with the challenged activity is equally without merit. Not only has Petitioner failed to reference any federal court of appeals decision which rejects this approach, this approach was specifically adopted by this Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

Finally, the writ should not issue because neither the allegations of the complaint, nor the facts adduced via pretrial discovery, would support a finding of state action. There was no governmental nexus with the challenged activi-

ties per Jackson. Nor was there the symbiotic relationship between the City of St. Petersburg and Respondent, which served as the basis for this Court's holding in Burton v. Wilmington Packing Authority, 365 U.S. 706 (1961) and the First Circuit's holding in Downs v. Sawtelle, supra.

ARGUMENT AGAINST GRANTING THE WRIT

Petitioner has not shown any basis of conflict between the decisions of this Court or other federal courts of appeals on the two issues raised in his brief.

First, Petitioner states that the consideration of allegations of racial discrimination as a factor in state action analysis by the Fifth Circuit in Greco and the Second Circuit in Weise v. Syracuse University, 522 F.2d 873 (2nd Cir. 1975), constitutes a conflict with decisions of this Court and other federal courts of appeals. Petitioner neglects to cite a decision of this Court which conflicts with the holdings by the Fifth and Second Circuits on this issue and Respondent has been unable to locate a United States Supreme Court decision which would prohibit giving special consideration to allegations of racial discrimination in the context of state

action determinations.

Respondent would, however, point out to the Court, that the giving of added weight to special circumstances has not been prohibited by this Court. The discussion of state action in Jackson shows that the Supreme Court indeed adheres to the proposition of "differences in circumstances beget differences in law." 419 U.S. 345, 358. A special circumstance considered in Jackson was the assertion by the petitioner therein that the private entity performed a "public function," which would in effect subject it to less scrutiny for purposes of state action analysis.

With respect to state action analysis at the federal court of appeals level, the only case that Petitioner uses as authority as a basis for a conflict on whether it is proper to give special consideration to allegations of racial

discrimination is the First Circuit's decision in Downs v. Sawtelle, supra. Petitioner maintains that the Downs court rejected the application of a "less stringent test" in a case involving an involuntary sterilization. Respondent disagrees with Petitioner's analysis of Downs. In footnote 5 of the opinion, the court states that it had previously (in an earlier case) "expressed [its] reservation" to an approach providing for less scrutiny in racial discrimination cases. More important, for purposes of deciding whether a conflict exists, the First Circuit left open the question of whether it would adopt such an approach in the future. Footnote 5 continues:

> Even if we were to adopt such an approach, however, we would be inclined to group infringements of fundamental rights and racial discrimination together for the purpose of state action analysis just as they receive comparable scrutiny in equal protection cases.

Likewise, in specifically dealing with

the Fifth Circuit's Greco decision, the Downs court, in footnote 7 at page 7 of the opinion stated:

> As we have noted,. . . we would, in this setting, equate racial discrimination with deprivation of a fundamental right for purposes of state action analysis.

These statements hardly constitute a conflict with the Fifth and Second Circuits' positions as expressed in Greco and Wiese. The issue of the propriety of using a less strict test in the context of racial discrimination cases was not presented to the Downs court and the court did not rule on it. Furthermore, the court's language suggests that it would consider applying such an approach and would even expand its application.

Not only has the First Circuit Court not rendered a decision in conflict with the positions taken by the Fifth and Second Circuits, the Ninth Circuit in Aasum v. Good Samaritan Hospital, 542

F.2d 792, 794 (9th Cir. 1976), also applies a less rigorous standard in cases involving allegations of racial discrimination, and the Eighth Circuit in Brisco v. Bock. 540 F.2d 392, 396 at n. 3 (8th Cir. 1976), indicated that it too would apply such a test in cases of racial discrimination for jurisdictional purposes under Section 1983. As stated by the District of Columbia Circuit in Spark v. Catholic University of America, 510 F.2d 1277, 1281-82 (D.C. Cir. 1975):

> If any principle emerges from these cases, it would appear to be that, at least where the question of race is not involved, it is necessary to show that the Government exercises some form of control over the actions of the private party.

An even weaker contention is that a conflict exists as to whether a nexus must be present between the governmental authority and the challenged activity. Petitioner asserts that the Downs court saw through the "Greco maze" and found

state action despite no governmental connection with the act complained about.

A review of the Greco decision shows that the court correctly analyzed the facts presented to it pursuant to the dictates of Burton v. Wilmington Parking Authority, 365 U.S. 706 (1961). Since the Greco court was presented with "non-obvious involvement of the state in private conduct," it searched for facts showing a symbiotic relationship akin to that found in Burton, and found, on balance, insufficient facts to meet that test. Greco v. Orange Memorial Hospital Corp., 513 F.2d 873, 878, 880-81 (5th Cir. 1975), quoting Burton at 722. In short, the Greco court's analysis can hardly be termed, as Petitioner suggests, a deviation from the pronouncements of this Court on state action.

Likewise, the First Circuit in Downs was presented with nondirect state involve-

ment. While, as pointed out by Petitioner, the First Circuit found state action despite the fact that the town of Milo did not involve itself directly in the involuntary sterilization, it did so because,

> the "State [had] so insinuated itself into a position of interdependence with [Milo Community Hospital] that it must be recognized as a joint participant in the challenged activity" . . . .

Id. at 6, quoting Burton at 725. In making its finding of state action, the analysis of the court is important because it shows, contrary to what Petitioner asserts, that Petitioner's compliant would be deficient under the test applied in Downs.

In Downs, the court characterized Greco as having "state involvement of considerably less magnitude" than the factual situation presented to it for review. 574 F.2d at 7. The court specifically noted that the most compelling

factor which militated towards a finding of state action was the power of the town to appoint the hospital's board of directors, a fact conspicuously absent from the present case, and noted by the District Court in the opinion below. As pointed out in Respondent's statement of the case, the lease between the City of St. Petersburg and Respondent requires that Respondent be responsible for managing the hospital. Petitioner's complaint does not even allege that the City of St. Petersburg controls the management of the hospital. Likewise, Petitioner's complaint does not allege, nor were facts revealed during discovery, that the City was involved in this dispute at hand, a fact also noted by the District Court in its opinion. Obviously, the District Court considered the instant case in light of the nexus approach set forth in Jackson and the interdependent/symbiotic

approach set forth previously in Burton, as did the Fifth Circuit, as pointed out previously, in Greco. See also Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5th Cir. 1976), cert. denied, 429 U.S. 872 (1976), wherein the reasoning of the court shows that is considered the factual situation in terms of both Jackson and Burton.

For purposes of deciding whether a conflict exists on the nexus issue, it should also be pointed out to the court that the First Circuit court devoted a portion of its opinion in Downs to the requirement of a nexus, and, in doing so, logically harmonized Burton (wherein the nexus requirement was not discussed) and Jackson (where it was):

> If this nexus analysis was required to establish state action in any context, Burton, which based its holding on purely passive state involvement, would be overruled. However, Jackson specifically reaffirmed Burton's vitality in cases where, after searching scrutiny, a

> true symbiotic relationship can be said to exist.
>
> . . . .
>
> The essence of Burton which survives Jackson is that the relationship between the state and the private institution may be so intertwined that the state will be held responsible for conduct of the institution with which it has no direct connection.

574 F.2d at 8, 9. It is clear that no conflict exists between the Fifth and First Circuits on this point.

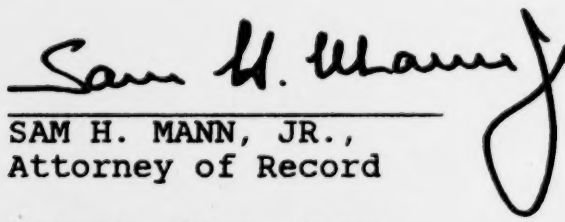
Finally, the other two cases cited by Petitioner, Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964), and O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973), do not address the issue of the requirement of a nexus. Indeed both cases were decided pre-Jackson, where the nexus approach was first announced. Certainly these decisions should not be relied on as authority for a proposition not considered.

CONCLUSION

The writ should not issue because no conflict has been shown between the decisions of this Court or the federal courts of appeal on the issues presented to this Court for consideration. Moreover, the decision of the District Court was in accord with the principles set forth by this Court in Burton and Jackson. Not only was there no nexus between the City of St. Petersburg and Respondent with respect to Petitioner's complaints, there was no showing of a symbiotic relationship between the hospital and the City which would obviate the need for a nexus. The Fifth Circuit was therefore correct in affirming the District Court's ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 3 copies of the foregoing Brief in opposition to Petition for Certiorari has been furnished by U.S. Mail to Kenneth C. Deacon, Jr., Post Office Drawer 1441, St. Petersburg, Florida 33731 this 28th day of August, 1980.



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